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No. 86-341

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

FORT HALIFAX PACKING COMPANY, INC.,
Appellant,

v.

P. DANIEL COYNE, Director, Bureau of Labor Standards Maine Department of Labor, *et al.*,
Appellees.

On Appeal from the Maine Supreme Judicial Court

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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The American Federation of Labor and Congress of Industrial Organizations, a federation of 91 national and international labor organizations with a total membership of 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

I. Appellant contends, first, that the severance pay benefits mandated by the Maine plant-closing legislation here at issue are invalid under the very broad preemption provision of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* This contention is wrong for two reasons.

A. First, ERISA § 514(a), 29 U.S.C. § 1144(a), preempts only state laws that "relate to any employee benefit plan," as such plans are defined in the Act.

ERISA's definition section applies the term "employee welfare benefit plan," the variant of "employee benefit plan" relevant here, only to "any plan, fund, or program . . . established or maintained by an employer . . ." § 3(1), 29 U.S.C. § 1002.1. The Maine Statute simply requires that if an employer terminates or relocates a plant (and if that employer has no express contract governing severance pay), affected employees must receive certain benefits. The Statute does *not* require that employers promise their employees such benefits, make plans in advance for funding such benefits, set the amount of such benefits, or establish a claims procedure for such benefits. While the Statute itself does establish some of these terms, insofar as it does so any "plan" is "established or maintained" not by an employer but by the state. In short, there *is*, contrary to the submission of the United States as *amicus curiae*, a difference of great legal significance between mandating payment of a benefit and mandating establishment of a benefit plan; that difference is explicit in ERISA's basic definitional section, and cannot be ignored.

B. The second reason the Maine plant-closing severance pay requirement is not preempted by ERISA is that if, contrary to our first submission, the Maine Statute does mandate that "plans" be established, those "plans" would be "maintained solely for the purpose of complying with applicable . . . unemployment compensation . . . laws", within the meaning of ERISA § 4(b)(3), 29 U.S.C. § 1003(b)(3). Under ERISA's preemption provision, there would therefore be no preemption.

It might at first blush appear that the term "unemployment compensation . . . laws" in § 4(b)(3) refers to the statutes enacted in every state to provide benefits for unemployed workers in conjunction with the federal Social Security Act. However, Congress could not possibly have intended to refer to those statutes in enacting § 4(b)(3); as many cases of this Court establish, the Social Security Act unemployment benefit statutes involve a *tax* upon employers, the creation of a *public* fund, and the payment of benefits as a purely governmental expenditure. As such, those statutes no more involve any "plan, fund or program established or maintained by an employer" than does any governmental program for making payments to eligible individuals out of public funds. Since there was therefore no reason to create an *exception* to ERISA coverage for public plans enacted through such laws, it is plain that Congress did not intend to do so in § 4(b)(3).

Rather, a consideration of the history of the relevant ERISA language demonstrates that what Congress had in mind in covering private unemployment benefit programs in ERISA § 3(1), as well as in excluding state-mandated plans of the same substantive type in § 4(b)(3), were supplemental unemployment compensation programs of the types developed by American industry beginning in the early 1950's. Those plans, and the federal tax statute governing such plans, recognize as one kind of benefit covered by the plan lump sum payments premised on permanent job loss. Those payments need not be integrated with the tax-supported unemployment insurance scheme nor must the plan set as a criteria for eligibility total unemployment after severance. Since the Maine planting closing law prescribes precisely such a benefit, it is an "unemployment compensation law" within the meaning of § 4(b)(3) of ERISA.

II. Appellant also maintains that the Maine plant-closing law cannot coexist with the National Labor Relations Act as amended, 29 U.S.C. § 141. This Court, however, in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), decisively laid to rest the contention, made here again in barely disguised form,

that the states are precluded by the NLRA from setting minimum labor standards to protect their citizens. It adds nothing to the arguments rejected in *Metropolitan Life* to observe, as appellants do, that one consequence of this rule is that employers who reach an impasse with a union may not implement an otherwise illegal employment condition. The "right" of employers under the NLRA to make unilateral changes after impasse simply restores the employers' right to act without consulting the union, but does not confer any immunity from any other legal requirement. And, by permitting employees, union and nonunion, to enter into express contracts different from the Maine severance pay requirement, Maine is simply balancing its interest in protecting its citizens against their interest in ordering their own affairs. Such an accommodation, often struck in American jurisprudence, provides more, not less, room for the policy of free collective bargaining than does a mandatory statute.

ARGUMENT

I. THE MAINE PLANT-CLOSING STATUTE IS NOT PREEMPTED BY ERISA, BOTH BECAUSE MAINE DOES NOT REQUIRE EMPLOYERS TO ESTABLISH ANY "PLAN" COVERED BY ERISA AND BECAUSE THE BENEFITS MAINE REQUIRES EMPLOYERS TO PAY ARE WITHIN THE EXPRESS EXCEPTION TO ERISA PREEMPTION FOR PAYMENTS "SOLELY FOR THE PURPOSE OF COMPLYING WITH APPLICABLE . . . UNEMPLOYMENT COMPENSATION LAWS."

In *Shaw v. Delta Airlines*, 463 U.S. 85 (1983), this Court summarized the pertinent structure of the Employee Retirement Income Security Act of 1974 ("ERISA") as follows:

> The federal Employee Retirement Security Act of 1974, 88 Stat. 829, as amended, 29 U.S.C. 1001 et seq. (1976 ed. and Supp. V) subjects to federal regulation plans providing employees with fringe benefits. ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. . . . The term "employee benefit plan" is defined as including both pension plans and welfare plans. The statute imposes participation, funding and vesting requirements on pension plans. 201-306, 29 U.S.C. 1051-1086 (1976 ed. and Supp. V). It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans. 101-111, 401-414, 29 U.S.C. 1101-1114 (1976 ed. and Supp. V). ERISA does not mandate that employers provide any particular benefits . . . .
>
> Section 514(a) of ERISA, 29 U.S.C. 1144(a), preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. . . . [Section] 4(b)(3) of ERISA, 29 U.S.C. 1003(b)(3), exempts from ERISA coverage employee benefits plans that are "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." [463 U.S. at 90-91 (footnotes omitted)].

Given this statutory scheme, the question whether the Maine plant-closing statute ("the Statute" or "the Maine Statute") here under attack was outlawed by Congress in passing ERISA is a question which can be approached via at least two routes. The first involves a determination whether the Maine Statute "relates to" any "employee welfare benefit plan" as the phrase in quotations is defined in ERISA § 3(1), 29 U.S.C. § 1002(1). We explain below why we agree with the Maine Supreme Judicial Court, but for reasons somewhat different than those of that court, that the Statute does not so "relate." Part (A), *infra*.

The other route to resolving the ERISA preemption question in this case, not addressed by the Maine court,

assumes, since there is under this approach no reason to decide, that the Maine Statute does prescribe an "employee welfare benefits plan", and does "relate to" that "plan" within the meaning of ERISA § 514(a), 29 U.S.C. § 1144(a). The question then becomes whether the "plan" to which the Statute relates is "maintained solely for the purpose of complying with applicable . . . unemployment compensation . . . laws," within the meaning of ERISA § 4(b)(3), 29 U.S.C. § 1003(b)(3); if so, the Statute would then relate only to a "plan . . . exempt under section 1003(b) of this Title", and, under the express terms of ERISA § 514(a), there would not be preemption. As we show below (Part B, *infra*), given the overall structure of ERISA and the established use of the term "unemployment" benefits in the technical language of employee benefit practices generally, as well as in federal laws concerning such benefits, the conclusion that any "plan" established by virtue of the Maine Statute falls within the § 4(b)(3) exclusion is inescapable.

A. In following the first path of inquiry outlined above, the principal question comes down to what Congress meant by an "employee welfare benefit plan" in enacting ERISA.

The Maine Statute applies only to employers without an "express contract providing for severance pay." 26 M.S.R.A. § 625-B(3)(B). While the Maine Supreme Court declined to decide the precise reach of the "express contract" exclusion (Juris. St. App. A9, n.9), that court did indicate that, in general, that provision "eliminates state regulation if a plan covering severance pay *is created* by an employer or employee organization." Pet. App. A9. In any event, the employer in this case not only had no "express contract" covering severance pay, but no applicable provision at all for making payments to employees upon involuntary separation generally, or upon a plant closing particularly. Thus, the employer in this case is contending not that the Statute "relates to" an employee benefit plan that the employer has "established or maintained", but that the Statute is preempted because Maine thereby requires the employer to establish or maintain a plan the employer would otherwise not have set up at all.

We may assume that if a state in terms required an employer to establish a program for paying ERISA-covered benefits, the complying program would indeed be an ERISA-covered plan, and the state law would "relate to" that plan within the meaning of ERISA § 514(a).[1]

[1] Whether this is true or not is not entirely clear. The interaction between the definition of "employee welfare benefit plan" in ERISA § 3(1) and the coverage exclusion in § 4(b)(3) of the Act indicates that at least a program that otherwise meets the statutory definition of "employee welfare benefit plan" does not escape that definition simply because the plan would not exist but for a state law requirement. For, as *Shaw v. Delta Airlines, supra*, stresses, § 4(b)(3) "[by] use of the word 'solely' demonstrates that the purpose of the entire plan must be to comply with an applicable [workmen's compensation, unemployment compensation, or disability insurance] law." 463 U.S. at 107. Since there would be no need to have the § 4(b)(3) exemption if the plans covered by the exemption would not otherwise be within the affirmative reach of the definitional sections of the Act, it must be true that "plans" maintained "solely for the purpose of complying" with a state law of a kind *not* enumerated in § 4(b)(3) of ERISA are within the affirmative reach of § (3)(1) of the Act. Thus, a plan established pursuant to a state law like the Hawaii statute in *Standard Oil v. Agsalud*, 663 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981), (but not the Hawaii law itself, because of an exemption applying only to it, § 514(b)(5)), would fall within the affirmative reach of § 3(1) even though the employer established and maintained the "plan" in question not voluntarily but solely as a result of a state law requirement that such a "plan" be set up.

In such a situation, the preemption problem under ERISA § 514(a) then turns upon whether the very state law that requires the "plan" be established is one that "relates to" those "plans" which would not exist at all but for that state law. This Court's summary affirmance in *Standard Oil v. Agsalud*, as well as some language in *Shaw v. Delta Airlines* (463 U.S. at 99-100) suggest that the Court, albeit without explicit plenary attention to the problem, has indicated that the answer to this "chicken-and-egg"

For example, the Hawaii statute in *Standard Oil v. Agsalud, supra,* required that employers in the state cover their employees with "prepaid group health care plan[s]." H.R.S. § 393-11. Those "plans," in turn, had to consist of agreements, binding for at least a year, with medical groups, nonprofit organizations, or insurers willing to supply on an ongoing basis either direct medical care or reimbursement for the cost of medical care. H.R.S. §§ 393-3(6), (7); 393-12. Moreover, since the "plan" could only qualify as meeting the statutory requirements if certain "[r]equired health care benefits" (H.R.S. § 393-7) were provided, the Hawaii statute necessarily mandated that the "plan" set out the benefits that were available. In short, the Hawaii statute did not simply require that employers pay certain medical costs once incurred; Hawaii required that the employers in the state set up in advance a detailed program for paying those costs, and then abide by that program.

Given this assumption, the open issue is whether, in contrast, a simple requirement that an employer make certain payments to employees of a type referred to in the ERISA definition of "employee welfare benefit plan" [2] is

question is "yes." The Maine Supreme Court in this case, however, was of the view that the answer is "no". Juris. St. App. A8-A9 ("Because Maine's severance pay statute is operative only when a privately created benefit plan covering severance pay is not in existence, it does not have a "connection with or reference to" an employee benefit plan covered by ERISA and is thus not preempted by Section 1144.") There is no reason in this case to explore this particular metaphysical problem further. For, as we argue in the text, the statute in this case does *not* mandate any "plan"; what would be the case if a state were to do so is therefore not relevant.

[2] For reasons we explain below (*infra,* at pp. 22-25), it is clear that the kind of benefits provided by the Maine plant closing law are "benefits in the event of . . . unemployment", and are therefore of a substantive type covered by the ERISA definition of "employee welfare benefit plan." Whether those benefits are also included in the "employee welfare benefit plan" definition as a "benefit described in section 186(c) of this title"—namely, "pooled . . . severance pay benefits"—is therefore not relevant. *See Gilbert v. Burlington Industries, Inc.,* 765 F.2d 320, 325-26 (2d Cir. 1985), *aff'd mem.* —— U.S. ——, 106 S. Ct. 326 (1986); *Holland v. Burlington Industries, Inc.,* 772 F.2d 1140, 1144-1145 (4th Cir. 1985), *aff'd mem. sub nom. Brooks v. Burlington Industries, Inc.,* 106 S. Ct. 3267 (1986) (both holding that severance benefits are "benefits in the event of . . . unemployment", but going on, unnecessarily, to hold as well that they are within ERISA coverage simply because they are severance pay benefits, without regard to whether they are "pooled" severance benefits.)

also a requirement that mandates a "plan" within ERISA's coverage.

We have no quarrel with the basic attributes of a "plan" articulated in *Donovan v. Dillingham,* 688 F.2d 1367 (11th Cir. 1982) (en banc), relied on by appellant and its *amici curiae*; *viz.,* "a plan, fund, or program under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefit, the source of financing, and procedures for receiving benefits." 688 F.2d at 1373. But it is not sufficient to meet ERISA's definition of a plan that the Maine Statute sets out sufficient terms concerning the required payments that, if the employer itself had voluntarily communicated a promise to provide similar terms to employees, the employer would have established an "employer welfare benefit plan" under ERISA. *See Brief for the United States as Amicus Curiae Supporting Reversal* ("Gov. Br.") at 13-14. For there *is,* contrary to the United States' submission, a "legally significant difference between mandating the establishment of a plan and mandating the payment of a benefit." *Id.* at 14 n.10. That difference inheres directly in ERISA's definition of an "employee welfare benefit plan."

Under that definition, there is no "employee welfare benefit plan" in the technical sense that term is used in ERISA unless there is a "plan, fund, or program . . . *established or maintained by an employer*". ERISA

§ 3(1) (emphasis supplied). As the Department of Labor itself recognizes, neither every payment of a benefit of the types enumerated in ERISA §§ 3(1) and (2) nor every obligation to pay such a benefit constitutes the establishment or maintenance of an "employee benefit plan" within the meaning of those sections. For example, the Department recognized in the early days of the Act that "[a]n informal policy—where, for example, an employer states that as a general rule, no pay will be deducted from an employee's wages on account of occasional short absences—fails to rise to the level of a plan or program" and is therefore not covered by ERISA. Notice of Proposed Rulemaking, 40 Fed. Reg. 24642 (June 9, 1975). Similarly, early Department interpretations indicate that there is a distinction between an employer promise, as part of an employment contract, to pay certain covered benefits, and the "plan" for paying those benefits. *See* Opinion Letters cited in *Jervis v. Elerding*, 504 F. Supp. 606, 608 (C.D. Calif. 1980), as well as the *Jervis* opinion itself.

The precise line between an ERISA "plan" and the payment of a fringe benefit outside of any "plan" is, it is true, far from a bright one. *See, e.g., Gilbert v. Burlington Industries, Inc., supra*; *Holland v. Burlington Industries, Inc., supra.* At a minimum, however, the definition of the term "plan"—in particular, the requirement that the employer "establish or maintain" a "plan, fund or program" for paying benefits—suggests *something* beyond the ultimate payment of benefits by an employer, standing alone. *Donovan v. Dillingham, supra*, the principal lower court case upon which appellant and the United States rely as establishing the criteria for whether a "plan" has been established, so held:

> The Secretary contends that "establish" means no more than an ultimate decision by an employer or an employee organization to provide the type of benefits described in ERISA § 3(1), 29 U.S.C. § 1002(1). A decision to extend benefits is not the establishment of a plan or program. Acts or events that record, exemplify or implement the decision will be direct or circumstantial evidence that the decision has become reality—e.g., financing or arranging to finance the intended benefits, establishing a procedure for disbursing benefits, assuring employees that the plan or program exists—but it is the reality of a plan, fund, or program and *not the decision to extend certain benefits* that is determinative. [688 F.2d at 1373 (emphasis supplied).]

This view of the ERISA definition of "employee welfare benefit plan" comports with both the definition's language and its function in the statute as a whole. The terms "plan, fund or program" denote as a matter of plain language some scheme to pay benefits *in the future*, not simply the actual payment of such benefits when the triggering event occurs. And the phrase "established or maintained by an employer" requires quite clearly that it is the *employer*, and not some third party, governmental or otherwise, that must subscribe to that scheme, and define its parameters.[8]

Further, the function of the definition of "employee welfare benefit plan" in the statute is, of course, to trig-

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[8] This analysis is consistent with the approach taken by this Court in *Shaw v. Delta Airlines, supra.* In *Shaw*, the Court made clear that a "plan" within the meaning of ERISA § 4(b)(3) refers to "an administrative unit" for delivering benefits, and not simply to the benefits themselves:

> As the Court of Appeals recognized, § 4(b)(3) excludes "plans," not portions of plans from ERISA coverage . . . There is no reason to believe that Congress used the word "[employee benefit] plan" to refer to individual benefits offered by an employee benefit plan. [463 U.S. at 107.]

Since the term "employee benefit plan" in § 4(b)(3), as elsewhere in ERISA, is governed by the definition of that term in § 3(1), the same conclusion must follow with regard to the definitional sections. *See* § 3(3), 29 U.S.C. § 1002(3) (defining an "employee benefit plan" as, *inter alia*, "an employee welfare benefit plan").

ger a series of obligations on the part of the employer—in particular, reporting, disclosure, and fiduciary duty obligations—as well as the obligation, enforceable in federal court and governed by federal law, to pay benefits under the plan in accord with the plan's terms. *See* ERISA §§ 101-111, 402-410, 502, 29 U.S.C. §§ 1021-31, 1101-14, 1132. The overall function of these requirements is to provide clear information to potential beneficiaries in advance as to what they can expect to receive, and to assure that they do in fact receive what has been promised to them. Absent some form of advance commitment by an employer to pay certain benefits, there would be nothing to report or disclose in annual reports or summary plan descriptions as to what that commitment is (*see* § 101-103). And absent such an advance commitment of some kind, there is no meaning to such requirements as creating a "written instrument" governing the plan and describing "the basis upon which payments are made to and from the plan" (§ 402), and no basis for a lawsuit "to recover benefits due to [a participant or beneficiary] under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan" (§ 502(a)(1)(B)).

In this instance, the Maine Statute imposes only upon "[a]ny employer who relocates or terminates a covered establishment" a simple obligation to make separation payments to employees. M.R.S.A. § 625(2). There is no requirement that employers who have no present intention of closing or relocating establish in advance any plan for making the required payments should such a contingency occur, or for determining how such payments will be funded.[4] Nor is there any requirement that employers assure their employees that such payments will be made should the establishment be relocated or terminated, or that the employer will set up any procedure for processing claims for payments.

Thus, if ERISA's reporting and disclosure requirements applied, there would be nothing to report or disclose in advance of the actual occurrence triggering the benefit payments. Nor could the fiduciary and enforcement aspects of ERISA meaningfully apply to the Maine Statute's bare benefit-payment requirement, since an employee's obligations would be judged solely by the terms of the Statute, and not in any sense by any plan separately (even if mandatorily) established or maintained by any employer.

In short, while the Maine Statute does impose upon terminating or relocating employers a responsibility to pay certain benefits, the Statute does *not* mandate that Maine employers generally "establish or maintain" any "plan, fund or program" for paying those benefits, or incorporate those benefits in any existing "plans," as those critical terms are used in ERISA. Consequently, the Statute does not "relate to" any ERISA covered plan, and is not preempted by ERISA.

B. The second statutory route to the conclusion that the Maine Statute is not preempted by ERISA is via the exemption to ERISA coverage, and therefore to ERISA preemption, created by the interaction between § 514(a) and § 4(b)(3) of the Act. The controlling question along this line of inquiry is whether the Maine Statute is an "applicable . . . unemployment compensation law" as that term is used in § 4(b)(3).

1. The "unemployment compensation" aspect of the ERISA § 4(3) coverage limitation is one which this Court has had no occasion to address. *Compare Shaw v.*

[4] *Compare*, in this latter regard, the Hawaii statute in *Standard Oil v. Agsalud*, *supra*, at H.R.S. §§ 393-3(7), 393-12 and 393-13 (every employer must contract with either a medical group undertaking to provide direct medical services or a nonprofit organization or insurer undertaking to defray medical expenses, and must pay at least one-half of the required premium for the coverage selected).

Delta Airlines, supra, (applying the "disability insurance" exception); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 n.20 (1981) (applying the "workmen's compensation" exception). At first blush, it might seem that, as the *amici curiae* supporting appellant assume without investigation (Gov. Br. at 16 n.12; *Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Appellant* at 13-14), the intent in enacting § 4(b)(3) must have been, at least primarily, to preserve from ERISA preemption the state laws passed as part of the program this Court has described as the "federal-state cooperative unemployment insurance programs . . . financed in part by grants from the United States pursuant to the Social Security Act, 42 U.S.C. §§ 501-503." *California Department of Human Resources v. Java*, 402 U.S. 121, 125 (1971).[6] However, both the function of § 4(b)(3) in ERISA as a whole and the legislative history of that section, considered in conjunction with the nature of the Social Security Act unemployment statutes, demonstrate that § 4(b)(3) could not possibly be meant to refer to those statutes.

As we have already seen (pp. 4-6, *supra*), § 4(b)(3) states an exclusion from ERISA coverage for plans that, but for the exclusion, would fall within the definition of "employee benefit plan" in § 3 of the Act. That definition refers to "any *plan, fund, or program* which was heretofore or is hereafter established or maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . benefits in the event of . . . unemployment." (Emphasis supplied.)

Unless the Social Security Act unemployment laws would in some sense involve a "plan" fitting this definition but for the exclusion contained in § 4(b)(3) there would be no point in an exclusion from coverage for the

[6] For clarity, those state laws are hereafter referred to as "Social Security Act unemployment statutes".

program established by such laws. Therefore, the initial inquiry must be whether the federal-state cooperative program for paying unemployment benefits created by the Social Security Act comes within the definition of "employee benefit plan"—and specifically the definition of "employee welfare benefit plan"—under ERISA.

This Court had occasion in the early days of the Social Security Act to review the nature of the Social Security Act unemployment laws:

> [These statutes] set[] up a comprehensive scheme for providing unemployment benefits for workers employed within the state by employers designated by [the statutes . . . . [They] impose[] on the employers the obligation to pay a certain percentage of their total monthly payrolls into the state Unemployment Compensation Fund. . . Benefits are payable from the fund to the employees covered by the Act, in the event of their unemployment, upon prescribed conditions and at prescribed rates. . . [C]ontributors to the state fund are entitled to credit their contributions in satisfactions of the tax imposed on employers by the Social Security Act, to the extent of 90 percent of the tax . . . [*Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 505-08 (1937).]

While contributions to the state unemployment funds are made by employers and benefits from the funds are paid to employees, that connection does not alter the fact, fundamental to this Court's seminal decision in *Carmichael Coal* as well as to many later cases in this Court concerning the Social Security unemployment compensation system, that

> the contributions which [these Social Security unemployment statutes] exact[] of employers are excise taxes[,] . . . an exertion of the taxing power of the state. . . . [They have] all the indicia of a tax, and [are] of a type traditional in the history of Anglo-American legislation. [*Id.* at 508.]

As taxes, mandatory employment payments to the state unemployment funds are, like other taxes, "not an assessment of benefits [but] . . . [a] means of distributing the burden of the cost of government." *Id.* at 522. The funds produced by the state unemployment taxes are "public funds" (*id.* at 517), and the benefits paid from those taxes are paid for a "public purpose" (*id.* at 514-15.)

In short, as the Court stated in *Labor Board v. Gullett Gin*, 340 U.S. 361, 364 (1951):

> Payments of unemployment compensation [are] not made to employees by [employers] but by the state out of public funds derived from taxation. True, these taxes were paid by employers, and thus to some extent [each employer] helped to create the fund. However, . . . the payments to employees [are] not made to discharge any liability or obligation to [the employer] but to carry out a policy of social betterment for the benefit of the entire state.

Compare Gullett Gin's holding that benefits under a state unemployment compensation statute were not "direct" but 'collateral" benefits, and therefore did not have to be deducted from the back pay award an employer was ordered to pay in an unfair labor practice proceeding. *Id. See also California Department of Human Resources v. Java, supra*, 402 U.S. at 136 (Douglas, J., concurring); *New York Telephone Co. v. New York State Dept. of Labor*, 440 U.S. 519, 534-35 (1979) (plurality opinion) ("unemployment benefits are not a form of direct compensation paid to strikers by their employer; they are disbursed from public funds to effectuate a public purpose. . . . [T]he employer-provided moneys are . . . . funneled through a public agency, mingled with other—and clearly public—funds, and imbued with a public purpose.") *Cf. California v. Grace Brethren Church*, 457 U.S. 393, 407 et seq. (1982) (because employer payments under Social Security unemployment compensation statutes are state

taxes, federal courts are without power to enjoin their payment.)

Thus, the programs established under Social Security Act unemployment benefit statutes do not involve a "plan, fund, or program . . . established or maintained by an employer." *Cf. Donovan v. Dillingham, supra*, 688 F.2d at 1372 and authorities cited. Rather, those programs were "established" and are "maintained" solely by the state and federal governments, using "public funds to effectuate a public purpose". *New York Telephone Co., supra*, 440 U.S. at 535. While employers as a group do provide the moneys ultimately disbursed as benefits, employers do so only as payment of a tax obligation. As such, employers have precisely the same relationship to unemployment benefits paid from employment taxes that taxpayers generally have to the many other public benefits—for example, welfare payments and medicaid benfits—that are paid to individuals for purposes also served by the private employee plans governed by ERISA. Just as none of those programs are affirmatively covered by ERISA,[6] so the programs established under Social Security Act state unemployment compensation statutes are also outside ERISA's purview entirely. That being the case, there is no reason Congress would have created an express exception from ERISA coverage for such laws.

The legislative history of the "unemployment compensation" aspect of § 4(b)(3), sparse thought it is, is consistent with this conclusion. The predecessor to ERISA, the

[6] For example, it has never been contended, nor would such a contention be credible, that ERISA's reporting, disclosure, and fiduciary obligation provisions apply to employers with regard to their payment of state and federal taxes. Those taxes fund, for example, medicaid benefits for the medically needy. *See* 42 U.S.C. § 1391 *et seq.*; *see, e.g.*, Cal. Welf. & I Code § 14000 *et seq.* Yet, there is no exemption in ERISA, in § 4(b)(3) or elsewhere, for government-mandated health care programs.

Welfare and Pension Plans Disclosure Act ("WPPDA"), Pub. L. No. 85-836, 72 Stat. 997 (1958), contained, in § 4(b) (2) of that Act, a very similar exclusion to that now contained in ERISA § 4(b) (3). Thus, WPPDA § 4(b) (2) provided that the WPPDA.

> shall not apply to an employee welfare or pension benefit plan if . . . such plan was established and is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation disability laws.

The reason for including in WPPDA the § 4(b) (2) exception to mandatory federal reporting and disclosure requirements is quite clear: Congress' concern in developing WPPDA was with "private employee benefit plans." S. Rep. No. 1440, 85th Cong., 2d Sess. at 2 (1958); *see also id.* at 5, 6, 10. Congress was quite aware that there were in addition "various social insurance programs developed by the Federal Government, the State governments, or the two acting in cooperation," and was aware in particular that as to certain varieties of government-mandated social insurance programs, the state statutes permit employers to provide coverage not only through a "State fund" but, *also*, at the employer's option, "through insurance companies . . . or self-insurance." S. Rep. No. 1734, 84th Cong., 2d Sess. at 15-16 (1956). The "weakness, waste, abuses, and unnecessary losses to the beneficiaries" (*id.* at 10) with which Congress was concerned in enacting WPPDA were perceived to exist only with respect to *private, voluntary* employee benefit plans, and not with respect to *either* purely governmental, state funded programs or those plans established and financed directly by employers but required, and policed, by governmental social insurance laws. The WPPDA § 4(b) (2) exception was intended to encompass the two varieties of state laws existent at the time that established mandatory benefit programs but permitted employers to meet their obligations by establishing their own benefit programs, rather than only by contributing to a state-funded program.

This basic decision concerning the private benefit plans to be covered by this kind of federal legislation, and those to be excluded, was carried forward into ERISA. As passed by both the House and the Senate, what became ERISA § 4(b) (3) was identical to WPPDA § 4 (b) (2), with the exception that the words "and is maintained" was added after "established" in the Senate bill, to parallel a similar change in ERISA's definition of "employee benefit plan" from that contained in the WPPDA. H.R. 4200, 93rd Cong., 1st Sess. (1973), § 503(h), reprinted in Senate Committee on Labor and Public Welfare, *Legislative History of the Employee Retirement Income Security Act of 1974* ("Leg. Hist.") (1976) at 2032; *see also id.*, § 502(b), Leg. Hist. at 2030; H.R. 2, 93rd Cong., 2d Sess. (1974), § 4(b) (3), Leg. Hist. at 3918; *see also id.* § 3(1), Leg. Hist. at 3902. In conference, however, the term "unemployment compensation disability insurance law" was changed, without explanation, to "unemployment compensation *or* disability insurance law." H.R. Rep. No. 93-1280, 93rd Cong., 2d Sess. (1974), 16 (§ 4(b) (3)), Leg. Hist. at 4291 (emphasis supplied); *see also id.* at 255, Leg. Hist. at 4522.

The effect of this change was to expand, in two ways, the options, outside of ERISA's purview, open to the states for providing mandatory benefits to employees through direct employer-provided benefit programs, rather than only through state-provided programs.[7] First, states

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[7] The conference report was also the first time that the ERISA preemption provision in its present very broad form surfaced. *See Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 745 (1985). With that development, § 4(b) (3), like the insurance saving clause involved in *Metropolitan Life Ins. Co.*, *supra*, took on much greater significance in the overall statutory scheme than previously: While, under the Senate and House bills,

could now mandate disability insurance without any linkage to any unemployment benefit program. Second, states now were assured the option of creating a third kind of government-mandated but not state-funded benefit program: one providing compensation for unemployment. There is, however, no indication that by adding an "or", Congress intended fundamentally to change the kinds of programs referred to in the § 4(b)(3) exception from *government-mandated but privately established and maintained plans* to tax-funded programs such as the Social Security Act unemployment insurance schemes.

2. The problem, then, becomes whether the Maine Statute here at issue—a variant of which was in effect at the time ERISA was passed, and was the subject of a case reported shortly before the ERISA conference bill was devised (*Shapiro Bros. Shoe Co., Inc. v. Lewiston-Auburn Shoeworkers Protective Association*, 320 A.2d 247, 250 n.3 (Maine S.J. Ct. 1974))—is the kind of law that *was* intended to be included within § 4(b)(3). The Maine plant-closing severance pay law is indubitably the same in *structure* as the other laws that remain valid because of ERISA's incorporation of the § 4(b)(3) exception in its preemption provision, § 514(a). Thus, like the workmen's compensation laws of many states and the disability laws of a few, the Maine Statute requires certain employers to pay specified benefits to employees meeting certain criteria.[8] Consequently, if the benefit required by the Statute is an "unemployment compensation" benefit, any "plan"

§ 4(b)(3) had served only to exempt government-mandated plans from the reporting, disclosure, and fiduciary exemption provisions of ERISA, under the conference bill § 4(b)(3) functioned as well as a major exception to the otherwise broad substantive preemptive reach of § 514(a).

[8] We repeat that we are assuming for purposes of this argument, although we do not believe it to be the case (*see* Part IA *supra*), that the benefits provided for in the Maine Statute do constitute an "employee welfare benefit plan" within the meaning of ERISA.

that might be required by the Statute would be within the § 4(b)(3) exception to ERISA.

Once again, the interaction between the affirmative coverage of ERISA as explicated in the definition of "employee welfare benefit plan", § 3(1) of the Act, and the exception contained in § 4(b)(3) is the best starting place for determining the status of the Maine Statute. For ERISA § 3(1) specifies as one of the types of benefits that bring a program within ERISA's coverage "benefits in the event of . . . unemployment." Absent some indication to the contrary, it would appear that Congress intended the "unemployment compensation" exception in § 4(b)(3) to cover benefits with same *substantive* characteristics as the "benefits in the event of . . . unemployment" that are within the affirmative coverage of the Act.

As with § 4(b)(3), the origin of the list of benefit types contained in ERISA § 3(1) lies in the similar WPPDA list.[9] That predecessor statute included, as wel-

[9] That list, in turn, may well have been derived from a similar list contained in § 302(c)(5) of the Taft-Hartley Act. As enacted in 1947, that statute permitted trust funds jointly trusteed by unions and employers for purposes of paying, "for the benefit of employees, their families and dependents, for medical and hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance or accident insurance." Pub. L. 101, 80th Cong. 1st Sess. (1947), § 302(c)(5), 61 Stat. 157-58 (1947). The "unemployment benefits" language was a late addition to the list; it was added in the conference report to the Senate language, with only the explanation that "[t]he conference agreement adopts the provisions of the Senate amendment with minor clarifying changes." H.R. 3020, 80th Cong. 1st Sess. (1947) § 302(c)(5), National Labor Relations Board, *Legislative History of the Labor Management Relations Act, 1947* ("LMRA Hist.") at 281.

The only clue in the Taft-Hartley debates to the origin of this late addition is that Senator Morse during the Senate debates com-

fare benefit plans, programs providing for "medical, surgical, or hospital care or benefits, or benefits in the event of accident, disability, death or unemployment." Pub. L. No. 85-836, 85th Cong., 2nd Sess., 1958, § 3(1). The drafters of ERISA began with that same list and added other enumerated types of benefits as well as "any benefit described in [§ 302(c) of the Taft-Hartley Act] (other than pensions on retirement or death, or insurance to provide such pensions.)" ERISA § 3(1), 29 U.S.C. § 1002(1). *See, e.g.*, S. Rep. No. 93-127, 93rd Cong., 1st Sess. 49, Leg. Hist. at 635 (using, in the Senate bill as reported by the Labor and Public Welfare Committee, the text of the WPPDA definition of "employee welfare benefit plan", with an amendment for Taft-Hartley plans).

The reason "benefits in the event of . . . unemployment" were included in the WPPDA is clear from the legislative history of that statute: The intention was to cover "[t]he relatively new supplementary unemployment-benefit ["SUB"] plans [that] complement the Federal-State program of unemployment insurance."

plained about the exclusion of unemployment benefits from the Senate list, and noted that David Dubinsky, the president of the International Ladies' Garment Workers' Union had noted the exclusion in his testimony on the bill. 93 Cong. Rec. 4882 (May 8, 1947) (remarks of Sen. Morse). In that testimony, Mr. Dubinsky did not refer to any particular unemployment benefit plans already existing. He did, however, note that the same private funding mechanism applied to pooled vacation payments "proved sufficiently workable and effective to justify its extension to other health and welfare services and unemployment benefits", and noted that "our industries are known for the irregularity of employment. Employers are small and . . . turnover is large. . . By the end of [the employees'] work year . . . their employer may be out of business." Hearings Before the Senate Committee on Labor and Public Welfare, Feb. 25, 1947, Statement of David Dubinsky. Thus, it appears that Congress added the "unemployment benefits" terminology precisely to permit experimentation with union-management negotiated solutions to job loss, including job loss due to plant closings.

S. Rep. No. 1440, 85th Cong., 2nd Sess. (1958) at 6; *see also* 104 Cong. Rec. 16425 (Aug. 6, 1958) (remarks of Rep. Perkins and Rep. Bosch) ("supplemental unemployment insurance" is one of the kinds of plans covered by the bill). It is therefore helpful, in determining the kinds of benefits that come within the "benefits in the event of . . . unemployment" language, to consider the nature of SUB plans as those plans have developed in American industry.

The early history of the private supplemental unemployment insurance plans was summarized in a Labor Department publication in 1965:

> Income security protection became an important issue in collective bargaining in the early 1950's, when a concerted effort was made by several unions for such protection via guaranteed annual wage or employment plans. The end result of this drive was the establishment of supplemental unemployment benefit plans. The first SUB plan was negotiated by Ford Motor Co. and the [UAW] in mid-1955. [United States Department of Labor, *Supplemental Unemployment Benefit Plans and Wage-Employment Guarantees*, Bulletin No. 1425-3 (1965), at 1.]

As part of the "income security protection" provided by SUB plans, many such plans came to include, and still include, not only weekly benefits to supplement the tax-funded benefits available to those temporarily out of work but, as well, "separation pay for laid-off workers whose employment terminated". *Id.* at 8.[10] By 1965, "[SUB] plans with nearly two-thirds of the coverage provided

[10] *See* Bureau of National Affairs, *Collective Bargaining Negotiations & Contracts* at 53:601, "Supplemental Unemployment Benefit Plans". For an example of a recently-negotiated SUB plan that include a severance payment not dependent upon lack of employment or receipt of tax-funded unemployment insurance benefits, *see id.* at 53:621 (Ideal Basic Industries, Inc. and Cement Workers, providing either a lump sum "termination benefit" or a weekly "layoff benefit").

separation pay." *Id.* Separation payments are often based, as in the Maine Statute, on a formula taking into account the number of years worked. *Id.* at 29. Unlike eligibility for the weekly temporary unemployment benefits, under SUB plans, eligibility for severance, separation or termination benefits is *not* typically based in any way on the claimant being without a job, or upon eligibility for tax-funded unemployed benefits. *Compare id.* at 17-19 with *id.* at 27-31.

Thus, the "income security" benefits provided by the supplemental unemployment benefit plans covered by the WPPDA and, later, by ERISA provide protection not only from temporary unemployment, but, as well, protection in the form of lump sum payments, based often on longevity of employment, from the dislocation necessarily caused by permanent loss of a job.[11] Indeed, since 1960,

[11] A recent Report of the Secretary of Labor's Task Force on Economic Adjustment and Worker Dislocation summarizes the nature of the injury caused by permanent loss of employment, regardless of whether the affected individual remains without any work at all:

> Worker dislocation constitutes a markedly different kind of unemployment in many respects. Many displaced workers have had long periods of attachment to their employers. Frequently the jobs lost have been achieved after working many years for a single employer, and workers often have difficulty in finding jobs that pay as much at the outset, or are comparable in other ways. Displaced workers often experience significant personal adjustments in moving to new employment and new occupations, and in some cases to new locations. [Bureau of National Affairs, *Daily Labor Report*, Jan. 13, 1987, at D-1.]

The Bureau of Labor Statistics defines displaced workers as "persons who lost their job due to plant closing, slack work, or position or job abolished, and who had significant attachment to their former positions (at least three years tenure)." *Id.* at D-5. While the harm suffered by displaced workers goes beyond simply not having some job, in fact such workers typically go without work for significant periods of time—a median of 18.3 weeks in one study. *Id.* at D-5. Indeed, "[c]ompared to the workforce as a whole, displaced workers endure a significantly longer duration of

federal tax law has recognized the broad nature of supplemental unemployment benefits, defining "supplemental unemployment compensation benefits" as

> benefits which are paid to an employee because of his involuntary separation from the employment of the employer (whether or not such separation is temporary) resulting directly from a reduction in force, the *discontinuance of a plant or operation*, or other similar conditions. [26 U.S.C. § 501(c)(17) (emphasis supplied).]

This definition, like the plans it was designed to accommodate, confirms that the terms "unemployment benefits" and "unemployment compensation" are technical terms that are properly applied, and were properly applied in 1974, to benefits precisely like those mandated by the Maine Statute; *viz.*, benefits payable on account of permanent job loss due to plant termination or relocation, regardless of whether the benefits: are paid in a lump sum or weekly; are integrated with the tax-supported unemployment insurance system or not; and are paid, under the applicable eligibility criteria, to the affected individual without regard to whether that individual has secured other gainful employment at the time of the receipt of benefits.

In sum, the Maine plant-closing statute is an "applicable . . . unemployment compensation law" within the meaning of ERISA § 4(b)(3). Therefore, if that Statute *does* "relate to" any "employee benefit plan", under the plain language of ERISA § 514(a) that "plan" is "exempt under [§ 4(b)(3)] of this Title", and there is no preemption by ERISA.

unemployment." *Id.* at D-6. And, once reemployed, displaced workers "showed average real earnings losses of 10 to 15 percent," with a significant percentage showing losses of 25 percent or more. *Id.* In short, permanent loss of employment is a form of "unemployment" that has personal income security consequences that usually include, but often go beyond, simply being out of work.

II. THE MAINE PLANT-CLOSING SEVERANCE PAY REQUIREMENT IS NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

The second argument appellant makes in support of its contention that Maine may not protect employees, and their communities, to some degree from the economic injury caused by closing or relocating large plants can be dealt with in short compass. The argument that the National Labor Relations Act, as amended, precludes Maine from enacting this protective legislation is refuted by this Court's decision in *Metropolitan Life Insurance Co. v. Massachusetts, supra.*

We begin from the proposition that *Metropolitan Life Insurance Co.*, squarely holds that the states may mandate the payment of a specified severance allowance by all employers meeting certain criteria. Such a statute would be nothing more than a "state . . . [regulation] that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements" in order to "'give specific minimum protections to *individual* workers.'" 471 U.S. at 754-55.[12]

[12] There may, in other circumstances, be a substantial question whether a given state regulation is one which indeed sets "minimal labor standards" (471 U.S. at 755) or one which instead so constricts the terms of a collective bargaining agreement that *any* meaningful bargaining on a mandatory subject of bargaining is precluded. *See, Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959). Similarly, some state labor standards, while setting "minimum" standards with respect to some employees, may function as "maximum" standards for others. This could be the case, for example, if a state attempted to set standards governing the functioning of seniority systems.

In our view, either of these situations might well test the limits of *Metropolitan Life* and support a holding that there is, indeed, NLRA preemption. Because the statute in this case leaves wide leeway for collective bargaining and is incapable of setting a maximum, rather than a minimum, employment standard, there is no reason to determine how the holding and reasoning of *Metropolitan Life* would apply if either of those circumstances did obtain.

Such a statute would, of course, have an effect on the collective bargaining process: The union would no longer have to bargain to obtain the state-specified plant-closing benefits, and could therefore use its bargaining power toward another end. To that degree, such a statute "grants the union a bargaining chip." Brief for Appellant at 21. But, as *Metropolitan Life* stressed, bargaining *generally* takes place against "'the backdrop of state law.'" 471 U.S. at 757. Thus, employers, for example, come to the bargaining table with such formidable "chips" as the common law right to control and manage the use of their property as the employer sees fit, including, for example, the right to assign work tasks and to set the hours the premises will be open. Unions may negotiate about such matters but, failing a management concession, the "backdrop of state law" will remain in place, and management's right to govern the workplace as management wishes (subject, of course, to state health and safety laws, federal minimum wage and antidiscrimination laws, and so on) will remain intact. Thus, the holding of *Metropolitan Life* merely recognizes that the states have the power to grant *employees*, as well as employers, individual rights on matters that constitute mandatory subjects of bargaining.

Nor is there any question that, under the holding of *Metropolitan Life*, state minimum labor standards govern during a bargaining impasse as well as at any other time. It is true, of course, that the employer ordinarily may, under the NLRA, change employment conditions once the employer has discharged entirely his obligation under the NLRA to bargain collectively. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). But that principle merely restores to employers the workplace governance rights that obtain in the situations in which the employees have not selected a collective bargaining representative. Nothing in the NLRA's impasse doctrine grants employers a federal unilateral right to implement terms and conditions of employment that are contrary to state labor pro-

tective laws; rather, the impasse doctrine simply removes the obligation to consult with the union before acting in an otherwise legal fashion.

Appellant contends, however, that Maine somehow ran afoul of the national labor policy by determining that rather than dictating a single policy applicable to all employers and employees, the state would allow employers and employees, union or nonunion, to contract out of the state-set plant-closing benefits. Clearly, such a system has a less intrusive impact upon the bargaining process than a system of labor protections that does not permit waivers : the weight of the union's "bargaining chip" is diminished by the fact that the state mandated standard can be bargained down as well as up. Because the parties *are* "permitted to set . . . a lower [benefit] level than that mandated by state law" (*Metropolitan Life*, 471 U.S. at 751), the parties have more room to frame their terms and conditions of employment to meet their particular needs than if only bargaining up is permitted.

Nor does the fact that the severance pay right granted by the state is waivable in any way suggest that the state's interest in conveying that right is not a bona fide concern for the individual employees' well-being. Many important individual rights created by constitutional and statutory law are waivable by the individuals upon whom they are conferred, or their representative. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458 (1938); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). The reason is that, as here, the interest in protecting individuals against exploitation must often be balanced against the value of allowing individuals to order their own affairs. This balance is often struck by conferring rights upon individuals, and then allowing those individuals to make the choice whether they would rather retain, or give up for something else, the right so granted.

Finally, the Maine Statute, with its accommodation for bargained alternatives, has no different effect upon the

ability of employers to make unilateral changes than would a mandatory, nonwaivable plant-closing severance pay statute. It is true that absent agreement from the union, an employer in Maine may not unilaterally implement a separation pay policy applicable upon plant-closing different from that mandated by the state. But under a statute setting mandatory, nonwaivable standards, the employer would also have been precluded from making a unilateral change that ignores the state's severance pay requirement.[13] Thus, while the waivability feature may be of no aid to an employer in an impasse situation, it is no hinderance either.

In short, the "express contract" exclusion in the Maine Statute does not burden the collective bargaining process established by the NLRA more substantially than would an inflexible, mandatory requirement that all employers provide specified plant-closing benefits. Rather, by allowing employers and employees to construct a form of protection different from that prescribed by the state, the Statute functions in much the same way as the remainder of the "backdrop of state law" against which collective bargaining occurs; *viz.*, the Statute confers certain rights upon one party to the federal bargaining process—in this instance, employees rather than employers—but then allows the employer and the union to go forward with only the constraint that any waiver of the state-conferred rights must be express and intentional. Since this is how the federal bargaining process interacts with such state-conferred rights as the employers' right to manage its property (and with the individual rights conferred by the NLRA itself (*see, e.g., Metropolitan Edison Co. v.*

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[13] Actually, the unilateral change scenario posited by appellant and its *amici curiae* is so hypothetical as to be nearly impossible to imagine. Apparently, the notion is that some employer who is about to close his plant but is nonetheless engaged in negotiations for a new contract would seek unilaterally to implement a severance pay policy when the plant closed, as a weapon toward the end of obtaining a better contract for his now closed plant.

NLRB, *supra*)), the argument that the Maine Statute is preempted by th? NLRA is without any substance.

CONCLUSION

For the reasons stated above, the judgment of the Maine Supreme Judicial Court should be affirmed.

Respectfully submitted,

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